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Supreme Court

of the

United States

OCTOBER TERM, 1989

IN RE: HOLYWELL CORPORATION, ET AL.

Debtors,

MIAMI CENTER LIMITED PARTNERSHIP

Petitioner,

vs.

THE BANK OF NEW YORK, ET AL.

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the issues raised in the petition for writ of certiorari are moot in light of the dismissal of the debtors' appeal of the order of confirmation of the plan of reorganization in *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988), *cert. den.*, __U.S.__, 109 S.Ct. 69, 102 L.Ed.2d 46?

2. Whether the requirement in the confirmed plan of reorganization that the Liquidating Trust convey title to the personal property at issue precludes review of the question of whether title could have actually passed?

3. Whether the relief sought by the Petitioner constitutes an impermissible modification of the confirmed plan?

PARTIES TO THE PROCEEDINGS

Petitioner Miami Center Limited Partnership ("MCLP"), a party to this proceeding, was one of several debtor-appellants in the United States Court of Appeals for the Eleventh Circuit. Respondent Bank of New York, a party herein, was an appellee below.

Respondent Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust ("Liquidating Trustee"), is also a party pursuant to Supreme Court Rule 19.6, although MCLP refers to him only as an interested party. Rule 19.6 provides that "all parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court. . ." The Liquidating Trustee was a party to the Bankruptcy Court's Order on Claim No. 502, sought to be reviewed.

Olympia and York Florida Equity Corporation and Miami Center Joint Venture, a joint venture whose partners are Olympia and York Florida Equity Corporation and debtor Theodore B. Gould, were appellants below, but have not sought review herein.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv-v
CITATION TO OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
APPLICABLE STATUTES AND RULES OF PROCEDURE	2-6
STATEMENT OF THE CASE	6
SUMMARY OF THE ARGUMENT	11
ARGUMENT	
I. THE ISSUES RAISED IN THE DEBTOR'S PETITION FOR WRIT OF CERTIORARI ARE MOOT	11
II. THE RELIEF SOUGHT BY THE PETITIONER IS AN UNLAWFUL MODIFICATION OF THE SUBSTANTIALLY CONSUMMATED PLAN ...	14
CONCLUSION	16

TABLE OF AUTHORITIES

Cases	Page
Claybrook Drilling Company v. Divanco, Inc., 336 F.2d 697 (10th Cir. 1964)	13
Holywell Corporation v. Bank of New York, 59 B.R. 340 (S.D. Fla. 1986)	8
In re AT of Maine, Inc., 56 B.R. 55 (Bankr. D. Me. 1985)	13
In re Blanton Smith, 81 B.R. 440 (Bankr. M.D. Tenn. 1987)	12
In re Hayball Trucking, Inc., 67 B.R. 681 (Bankr. E.D. Mich. 1986)	13
In re Heatron, 34 B.R. 526 (Bankr. W.D. Mo. 1983)	13
In re Holywell Corporation, No. 88-80, slip op. (S.Ct. Oct. 3, 1988)	6
In re Jartran, Inc., 76 B.R. 123 (Bankr. N.D. Ill. 1987)	12
In re Monroe Well Service, Inc., 80 B.R. 324 (Bankr. E.D. Pa. 1987)	12
In re Northampton Corporation, 59 B.R. 963 (E.D. Pa. 1984)	13

TABLE OF AUTHORITIES (Continued)

Cases	Page
In re Sanders, 81 B.R. 496 (Bankr. W.D. Ark. 1987)	12
In re Seminole Park and Fairgrounds, Inc., 505 F.2d 1011 (5th Cir. 1974)	13
In re St. Louis Freight Lines, Inc., 45 B.R. 546 (Bankr. E.D. Mich., N.D. 1984)	12
In re Theodore Gould, __U.S.__, 109 S.Ct. 148, __L.Ed.2d__ (1988)	8
Miami Center Limited Partnership v. Bank of New York, 838 F.2d 1547 (11th Cir. 1988) *cert. den.,* __U.S.__, 109 S.Ct. 69, 102 L.Ed.2d 46	6, 8
STATUTES	
11 U.S.C. Section 541(a)	7
11 U.S.C. Section 1127(b)	14
11 U.S.C. Section 1142(a)	12
28 U.S.C. Section 1254(1)	2, 4
S.Ct.R. 17.1(a)-(c)	2, 5
S.Ct.R. 19.6	ii

CITATION TO OPINONS BELOW

The Order on Claim No. 502 of the United States Bankruptcy Court for the Southern District of Florida appears at MCLP's App. 19.

The Order Affirming Bankruptcy Court's Order on Claim No. 502 and Order on Appellant's Motion for Clarification of the United States Bankruptcy Court for the Southern District of Florida appear at MCLP's App. 9 and 16, respectively.

The opinion affirming the orders of the district court and bankruptcy court by the United States Court of Appeals for the Eleventh Circuit appears at MCLP's App. 5. The Eleventh Circuit's denial of the petition for rehearing filed by Olympia and York Florida Equity Corporation and Miami Center Joint Venture appear at MCLP's App. 1. The denial of the petition for rehearing filed by Miami Center Limited Partnership, Holywell Corporation and Theodore Gould appears at MCLP's App. 3.

STATEMENT OF JURISDICTION

Debtor MCLP seeks review pursuant to 28 U.S.C. Section 1254(1) of the bankruptcy court's Order on Claim No. 502, affirmed by the United States District Court for the Southern District of Florida, and by the Eleventh Circuit Court of Appeals. Section 1254(1) provides for review of appellate decisions by writs of certiorari. MCLP's petition fails to meet any of the established criteria for such review. The petition does not allege or demonstrate a genuine conflict with a decision of another federal court of appeals on the same matter, or demonstrate a departure from the accepted and usual course of judicial proceedings. It also does not allege an important question of federal law which has not been, but should be, settled by the Court. *See* S.Ct.R. 17.1(a)-(c).

In addition to not satisfying any of the established grounds for review by way of writ of certiorari, MCLP's petition is moot, as more fully developed in the argument section of this brief. Accordingly, the Court lacks jurisdiction to review the orders complained of.

APPLICABLE STATUTES AND RULES OF PROCEDURE

11 U.S.C. Section 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c) (2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, device, or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

28 U.S.C. Section 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Supreme Court Rule 17. Considerations governing review on certiorari.

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Supreme Court Rule 19. Review on certiorari — how sought — parties.

> .6 All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner shall notify the Clerk of this Court in writing of petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceedings below and a party noted as no longer interested may remain a party here by notifying the Clerk, with services on the other parties, that he has an interest in the petition. All parties other than petitioners shall be respondents, but any respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner, except that any response by such respondent to the petition shall be filed within 20 days after receipt of the petition. The time for filing such response may not be extended.

STATEMENT OF THE CASE

The instant petition for writ of certiorari is the debtor's fourth attempt at review in this Court.[1] In fact,

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[1]The debtors unsuccessfully sought review of the order of confirmation of the plan of reorganization. *See Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. den.*, __U.S.__, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988); *In re Theodore Gould*, __U.S.__, 109 S.Ct. 148 (1989). The debtors also unsuccessfully sought review of the Eleventh Circuit's dismissal of their attempt to dismantle the plan by claiming the right to monies that were included in the confirmed plan. *In re Holywell Corporation*, No. 88-80, slip op. (S.Ct. Oct. 3, 1988).

since MCLP filed for bankruptcy in 1984, there have been over 75 appeals, the vast majority of which were and continue to be filed by MCLP and its co-debtors, Theodore Gould, Holywell Corporation, Chopin Associates and Miami Center Corporation.

MCLP is one of five related debtors[2] who filed voluntary Chapter 11 petitions in the United States Bankruptcy Court for the Southern District of Florida in August, 1984. The debtors obtained consolidation of the cases for purposes of joint administration, together owing over 400 creditors more than $350 million. The bankruptcy petitions were filed in response to foreclosure proceedings instituted by the Bank of New York on its loans to the debtors for the construction of the Miami Center, an office and hotel development in downtown Miami, Florida. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d at 1548.

In August, 1985, the bankruptcy court confirmed a plan of reorganization proposed by the Bank of New York. That plan provided for the creation of the Miami Center Liquidating Trust and the appointment of a liquidating trustee. The plan provided that the assets of the Miami Center Liquidating Trust were to include all of the debtors' assets, as defined by 11 U.S.C. Section 541(a), and in addition, what is referred to as the

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[2]The other debtors are Theodore B. Gould; Holywell Corporation, of which Mr. Gould is the sole shareholder, president, and director; Miami Center Corporation, of which Mr. Gould is president and director and Holywell Corporation is sole shareholder; and Chopin Associates, a partnership in which Mr. Gould and Miami Center Corporation are the sole general partners. Petitioner MCLP is a limited partnership in which Mr. Gould and Miami Center Corporation are the only general partners.

Washington proceeds.[3] The plan also included the Miami Center as an asset of the trust, and required the Liquidating Trustee to convey the Miami Center to the Bank of New York, or its designee, for $255.6 million, free and clear of all liens. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d at 1548-49.

Although the debtors appealed the order of confirmation of the plan, they failed to post a supersedeas bond to stay its effect. Accordingly, the plan became effective and was implemented on October 10, 1985. The United States District Court for the Southern District of Florida affirmed the confirmation order on the merits, *Holywell Corporation v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986), and the debtors' appeal to the Eleventh Circuit Court of Appeals was dismissed. That court held the district court should have dismissed the appeal as moot because the plan had been substantially consummated and the courts could not grant meaningful relief. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d at 1557-58. This Court denied the debtors' petitions for writs of certiorari and mandamus. *See Miami Center Limited Partnership v. Bank of New York*, __U.S.__, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988) and *In re Theodore B. Gould*, __U.S.__, 109 S.Ct. 148, __L.Ed.2d__ (1988), respectively.

Olympia & York Florida Equity Corporation, a general partner of the Miami Center Joint Venture along with Theodore Gould, separately appealed the

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[3]*See In re Holywell Corporation*, No. 88-80, slip op. (S.Ct. Oct. 3, 1988).

order of confirmation. Olympia and York Florida Equity Corporation objected to the plan's equitable subordination of Miami Center Joint Venture's claim of priority for the market value of certain furniture, fixtures and equipment (FF&E) under the A and B leases, cumulative defaulted rent payments, and late charges leased to MCLP (referred to as Claim 502). The district court, in case no. 85-3230-Civ-Atkins, reversed that aspect of the plan which equitably subordinated Miami Center Joint Venture's Claim 502. (MCLP's App. 55). While Petitioner MCLP asserts that the district court in case no. 85-3230-Civ-Atkins reversed the entire order of confirmation (Petition for Writ of Certiorari at 13), the district court was careful to point out that the debtors' separate appeal of the order of confirmation to the Eleventh Circuit had been dismissed as moot. (MCLP's App. 58). A complete reading of this decision makes it clear that the district court only reversed the subordination of Claim 502 by the plan. (App. 62-72). That decision is now pending before the Eleventh Circuit, case no. 89-5346.

On June 24, 1985, the bankruptcy court entered a Memorandum Decision holding that Miami Center Joint Venture's A and B leases covering the FF&E were in fact true leases, as opposed to unperfected security agreements. (MCLP's App. 75). The bankruptcy court noted that the issue of the amount necessary to cure lease defaults had not been fully presented, and it scheduled that issue for a subsequent hearing. During the appeal by the Bank of New York of this order, the plan of reorganization was confirmed. The district court thereafter affirmed the bankruptcy court's "true lease" decision, finding that the plan required the Liquidating

Trustee to exercise the option price of the A and B leases in order to be in a position to transfer title of the FF&E to the Bank of New York. (MCLP's App. 98). The plan itself provided:

> The trustee shall be required to:
>
> > (iii) Take all steps and make all payments from such cash (and, if necessary, from the Washington proceeds) to exercise the purchase option in the Miami Center Joint Venture FF&E leases and to obtain title to the FF&E covered by the Miami Center Joint Venture leases.

(MCLP's App. 102). The Eleventh Circuit affirmed, holding:

> Passage of title of the FF&E to the Liquidating Trustee, however, was part of the confirmed plan of reorganization. We have already held that 'the plan ha[s] been substantially consummated. . . and that it ha[s] become legally and practically impossible to unwind the consummation of the plan or otherwise restore the status quo.' *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547, 1557 (11th Cir. 1988). The issue argued by appellants is therefore moot. *Id.*

(MCLP's App. 8). This petition followed.

SUMMARY OF ARGUMENT

Debtor MCLP's petition for writ of certiorari is moot and should be denied. The question of whether title to the furniture, fixtures and equipment (FF&E) covered by the A & B leases passed to the purchaser of the Miami Center is answered by the confirmed and substantially consummated plan of reorganization; the plan unmistakably provided for title to be conveyed. Thus, title passed as a matter of law, and the question of whether title could have passed if the parties tried to do so without a plan of reorganization must forever remain unanswered. The conveyance of title was an integral part of the plan, as the purchase price included the FF&E. Thus, the issue raised by the petition for writ of certiorari is moot.

In addition to being moot, this issue is a prohibited modification to the implemented and substantially consummated plan, and cannot be allowed.

The petition for writ of certiorari should be dismissed.

ARGUMENT

I.
THE ISSUES RAISED IN THE DEBTOR'S PETITION FOR WRIT OF CERTIORARI ARE MOOT

The debtors' petition for writ of certiorari should be dismissed as moot, and the issue of whether the Liquidating Trustee could actually convey title to the

FF&E to the Bank of New York, as opposed to merely possession, must forever remain unanswered.

The law of this case is well established that (1) the confirmed plan of reorganization required the Liquidating Trustee to convey title to the FF&E under the A and B leases to the Bank of New York[4]; (2) the plan has been substantially consummated; (3) the plan cannot be modified or taken apart in a piecemeal manner, *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d at 1555; and (4) the plan is binding on the debtors and creditors, regardless of whether they voted to accept it. *See In re Blanton Smith*, 81 B.R. 440 (Bankr. M.D. Tenn. 1987); *In re Sanders*, 81 B.R. 496 (Bankr. W.D. Ark. 1987); *In re Monroe Well Service, Inc.*, 80 B.R. 324 (Bankr. E.D. Pa. 1987); *In re Jartran, Inc.*, 76 B.R. 123 (Bankr. N.D. Ill. 1987); *In re St. Louis Freight Lines, Inc.*, 45 B.R. 546, 552 (Bankr. E.D. Mich., N.D. 1984). Moreover, regardless of whether they agree with the plan, the debtors are affirmatively required to carry out its terms. *See* 11 U.S.C. Section 1142(a).[5]

Thus, it does not matter whether the Liquidating Trustee rejected or assumed the A and B leases as a matter of fact, because the purchase option was exercised and title was conveyed as a matter of law. The

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[4]*See* MCLP's App. 102.

[5]11 U.S.C. Section 1142(a) provides, in relevant part:

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

issues of whether MCLP exercised the purchase option prior to confirmation of the plan and whether title passed to the Liquidating Trustee must remain unanswered because the plan, as confirmed, required the Liquidating Trustee to acquire and then convey title. The debtor's contentions notwithstanding, the Liquidating Trustee was obligated to carry out the terms of the plan and convey title of the FF&E to the purchaser of the Miami Center.

The Petitioner does not dispute that the plan requires title to be transferred; rather, Petitioner questions whether title could in fact pass. The Eleventh Circuit's decision in *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988), dismissing the debtors' appeal of the confirmation order as moot, makes it clear that it is not appropriate to re-visit the merits of the plan, as it is the law of this case that there can be no "piecemeal dismantling" of the plan. 838 F.2d at 1555. Accordingly, the question of whether title could have actually passed is not subject to further adjudication.

The passage of title to the FF&E to the purchaser of the Miami Center is an integral provision of the plan. In the dismissal of the debtors' appeal of the confirmation order, the Eleventh Circuit declared: "The bankruptcy court did not err in finding, and the district court did not err in affirming that the plan had been substantially consummated and that its fairness, feasibility, and propriety had been verified. . ." 838 F.2d at 1557. The plan unmistakably provided for title to the FF&E to pass to the Bank of New York, and the district court's reversal of the plan's subordination of

Miami Center Joint Venture's Claim 502 does not alter this fact. That decision merely raised Miami Center Joint Venture from a class 7 creditor to a creditor with a higher priority.

As the plan's provisions regarding transfer of title are not subject to modification or collateral attack, the question of whether title actually passed must remain unanswered. Accordingly, the petition for writ of certiorari is moot and should be dismissed.

II.

THE RELIEF SOUGHT BY THE PETITIONER IS AN UNLAWFUL MODIFICATION OF THE SUBSTANTIALLY CONSUMMATED PLAN

The debtor's claim that title to the FF&E did not actually pass is little more than a collateral attack on the confirmed plan. Well settled bankruptcy law prohibits modification of a confirmed and substantially consummated plan. *See* 11 U.S.C. Section 1127(b)[6]; *In re Seminole Park and Fairgrounds, Inc.*, 505 F.2d 1011, 1014 (5th Cir. 1974); *In re Northampton Corporation*, 59 B.R. 963, 968-69 (E.D. Pa. 1984); *see also Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697, 701 (10th Cir. 1964); *In re Hayball Trucking, Inc.*, 67 B.R. 681, 684 (Bankr. E.D. Mich. 1986); *In re AT of Maine, Inc.*, 56 B.R. 55, 57 (Bankr. D.Me. 1985); *In re Heatron*, 34 B.R. 526 (Bankr. W.D. Mo. 1983).

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[6]11 U.S.C. Section 1127(b) provides, in pertinent part: "The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and *before substantial consummation of such plan*. . ." (emphasis supplied).

Thus, title to the FF&E passed pursuant to the express terms of the plan of reorganization to the Bank of New York as a matter of law. Acceptance of the Petitioner's contrary position would be an impermissible modification of the plan, and cannot be allowed.[7]

[7]Former counsel to the Liquidating Trustee submitted a memorandum of law in the bankruptcy court in which he took the position that MCLP never exercised the option to purchase the FF&E, never had title to it, and thus the Liquidating Trustee, as successor to MCLP's interest, never had title to the FF&E. (MCLP's App. 83). Former counsel was discharged in 1987. The views expressed in that memorandum of law are *not* the views of the Liquidating Trustee and his present counsel.

CONCLUSION

The issues raised in the petition for writ of certiorari are moot. The debtor's contentions are nothing more than collateral attacks on the plan, as the debtor seeks a prohibited moficiation of the plan. MCLP's arguments are without merit and the petition is moot. It should be dismissed.

RESPECTFULLY SUBMITTED,

Herbert Stettin, Esquire